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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

ENOCH ADAMS, JR., LEROY ADAMS,
ANDREW KOENIG, JERRY NORTON
DAVID SWAN and JOSEPH SWAN,

Plaintiffs,

v.

TECK COMINCO ALASKA INCORPORATED

Defendant.

NANA REGIONAL CORPORATION and
NORTHWEST ARCTIC BOROUGH,

Intervenors-Defendants.

Case No. A04-49 (JWS)

**PLAINTIFFS' REPLY
IN SUPPORT OF
MOTION IN LIMINE TO
BAR TESTIMONY BY
CERTAIN PROFFERED
EXPERTS [DOCKET 210]**

Adams filed a Motion in Limine at Docket 210 asking the Court to exclude the expert witnesses that Teck Cominco had proffered without attaching qualifications, in violation of the Court's pre-trial order (Docket 177). After Adams timely filed a reply pointing out that Teck Cominco had not responded to the motion and had thus conceded it [Docket 281], Teck Cominco

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION IN LIMINE TO BAR CERTAIN EXPERTS

1 requested and was granted leave to file a response to Docket 210 [Docket 291]. Teck Cominco
2 filed that response, Docket 292, on March 3, 2008 (“Opposition”). Adams here timely replies.

3 Teck Cominco concedes that it did not follow the instructions of this Court and file
4 statements of qualifications on January 22, 2008. Opposition at 1, 2. It makes two arguments as
5 to why it should be allowed to disregard the Court’s Order, one with regard to its retained experts
6 and one with regard to those witnesses it calls here for the first time “percipient witnesses with
7 expertise.” Its basic point on its retained experts is well taken, but it still fails to comply with the
8 Court’s Order with regard to five expert witnesses, whose testimony should be excluded.

9 **I. TECK COMINCO HAS LARGELY CURED ITS FAILURE TO FOLLOW THE**
10 **COURT’S ORDER WITH RESPECT TO ITS RETAINED WITNESSES.**

11 Teck Cominco’s argument with respect to its retained witnesses is basically that missing
12 the Court’s deadline by one day does not prejudice Adams. Opposition at 2. Adams concurs,
13 which is why in its Motion, it requested that the Court strike only those experts for whom Teck
14 Cominco had not ever provided qualifications. Docket 210 at 4; *see also* Proposed Order at
15 Docket 210-2. (Adams does object to the statements in the Opposition and the declaration of
16 Rachel Davis [Docket 293] that Teck Cominco “long ago” provided these qualifications, based
17 on its provision, in 2003 and 2004, of the resumes of its retained experts. Obviously, the Court’s
18 Order pertained to *current* resumes or qualifications, not those provided five years ago.)

19 **II. TECK COMINCO CONTINUES TO VIOLATE THE COURT’S ORDER WITH**
20 **RESPECT TO FIVE WITNESSES, WHO SHOULD BE STRUCK.**

21 Teck Cominco concedes that it has not provided the qualifications of five of the witnesses
22 it proffers as experts for trial. Opposition at 1, 3. Its defense is that its “failure to produce that
23 which is not available” is not “contumacious conduct.” Opposition at 1. Adams respectfully
24 disagrees.

25 First, the Court’s Order on pre-trial disclosures was entered on September 21, 2007.
26 Docket 177. Teck Cominco thus had almost exactly four months to secure the necessary
27 qualifications the Court’s order required to be disclosed on January 22, 2008. Teck Cominco,
28 with no evidentiary support and in an unsworn argument of counsel, says that it has been unable

1 to secure these qualifications because the attorney general's office asked that state witnesses be
2 coordinated through its office. Opposition at 3. Teck Cominco asserts that it is "unaware of any
3 mechanism at their disposal to compel the relevant witnesses to provide the desired information"
4 – while at the same time asserting that the *plaintiffs* have "known for years the identities and
5 contact information for each of these public servants." Opposition at 3. Surely, in the four
6 months between the order and the required disclosure, someone at Teck Cominco could have
7 picked up a telephone and, using the contact information that Teck Cominco asserts is so easily
8 available, secured a resume or other statement of qualifications from these five witnesses. Teck
9 Cominco has not supported in any way its assertion that the required disclosures are "not
10 available." Opposition at 1.

11 Second, Teck Cominco asserts that "plaintiffs have not asserted that any harm is
12 occasioned by a delay in securing government-employee qualifications and no harm is apparent."
13 Opposition at 5. Adams respectfully disagrees. In its motion, Adams noted, "Because of Teck
14 Cominco's failure to follow the explicit directions in the Pre-Trial Order, Adams has no way to
15 scrutinize the credentials of the proffered experts and challenge the experts in a motion in limine
16 based on their qualifications or prepare cross examination with the knowledge of their
17 backgrounds." Docket 210 at 4. Adams is directly harmed, and, because the deadline for
18 challenges to experts has now long past, this harm is not curable.

19 While Teck Cominco now calls these witnesses "percipient witnesses with expertise,"
20 Opposition at 3, it did not so list them in its witness list. There, it merely listed each as an
21 "expert witness." Docket 203. In this regard, it complied with *part* of the Court's pre-trial order:
22 "Expert witnesses will be identified as such and as to their area(s) of expertise, and a statement
23 of each expert's qualifications will be appended to the witness list." Docket 177 at 3. Because it
24 did not comply with the rest of the Court's order, these witnesses should be excluded.

25 Because Teck Cominco did not – and still, six weeks later, has not – complied with the
26 simple dictates of the Court's Order, the Court could bar all testimony by those "experts" listed
27 on Teck Cominco's Penalty Phase Witness List for whom Teck Cominco has never provided
28

expert qualifications. John Houghton, John Middaugh, Fred DeCicco, Al Townsend and Phyllis Weber-Scannell should be barred from testifying at trial.

Respectfully submitted this 10th day of March, 2008.

/S/ Luke Cole

Luke Cole
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March 2008, a true and correct copy of the foregoing Reply in Support of Motion in Limine to Bar Testimony by Certain Proffered Experts, via electronic mail, on the below identified parties of record:

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/S/

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